

**OPINION**  
**74-43**

May 15, 1974 (OPINION)

Mr. Thomas E. Rutten  
City Attorney

Devils Lake, ND 58301

Dear Mr. Rutten:

This is in reply to your letter of March 28, 1974. You request the opinion of this office concerning an apparent conflict between Chapter 40-22 and Chapter 40-31 of the North Dakota Century Code. You further request the advice of this office on whether your city may proceed to reseal streets and assessed adjoining property owners for the costs of resealing had been previously done within the past year.

Section 40-22-01 of the North Dakota Century Code provides that the city may charge the costs of certain improvements to the property owners by special assessments. In subsection 2, curbs and gutters are specifically mentioned among other improvements listed that are subject to special assessments. Although it is apparent that curb and gutter construction or reconstruction is to be paid by special assessment, it is the conclusion of this office that the procedures which specifically allow adjoining property owners the opportunity to protest are not governable if the City Commission chooses to proceed under Chapter 40-31 of the North Dakota Century Code.

Chapter 40-31 provides that curb and gutter improvements may be made as prescribed by the governing body of the city. Nowhere in the provisions of Chapter 40-31 is it provided that property owners shall have an opportunity to protest, nor is it specifically required that the governing body of the city pass a resolution of necessity, as is normally required when work is to be done by special assessment. Therefore, the requirements pertaining to a resolution of necessity as found in Section 40-22-15 are not applicable. Nor are the opportunities for protest by property owners pursuant to Section 40-22-17 allowable when Chapter 40-31 is the selected mode of procedure.

This precise question was before the North Dakota Supreme Court in *Deuchscher v. City of Jamestown*, 237 N.W. 814 (N.W. 1931). The Court held that the mode provided in Chapter 40-31 did not include the necessity of following any of the requirements in Chapter 40-22. On page 815, the Court stated:

"The mode provided in the 1917 law (Chapter 40-31) is clearly inconsistent with that provided in Sections 37-03 and 37-04 (Chapter 40-22). Hence, where the council proceeds under the 1917 law, the inconsistent provisions of the earlier statutes are clearly not applicable."

The Court states further, on page 816:

"It follows that when proceedings are had for the construction of curbing under the Comprehensive Act of 1917, which purports to outline every step requisite and to be a complete mode in itself, the original requirements of plans, specifications, estimates, separate bidding and contracting, resolution of necessity, publication, and protests are all necessarily inconsistent with the mode and authority expressed in the later statute, and hence its requirements cannot be applicable where this method is invoked as in the instant case. This is not to say that the original method is necessarily repealed and can no longer be followed as an optional method."

It is therefore our opinion that the City Commission need not proceed with any of the requirements listed in Chapter 40-22, including a "resolution of necessity" or an "opportunity to protest." This conclusion is necessarily based upon the assumption that the requirements of Chapter 40-31 have been met, including the adoption by resolution or ordinance, of plans and specifications pursuant to Section 40-31-01. It is also necessary to emphasize that our opinion does not preclude an election being made by the City Commission, to proceed pursuant to the provisions of either Chapter, in accordance with the above quoted language expressed in the Deuchscher case.

You state your second question as follows:

"Another question has been raised by a member of the City Commission is whether or not the city can reseal the city streets and assess the adjoining property owners for such improvement if the same street has been resealed previously within the past few years. We have a situation in our city where some of the streets need resealing almost every Spring and apparently some of the adjoining property owners are objecting to being assessed for these improvement projects because of having been previously assessed for the same project within the last year or so. Please advise if the city can proceed to reseal streets and assess the adjoining property owners for the cost of such resealing project if such resealing has previously been done within the past year or so. I will appreciate any information in this regard."

It is apparent that the resealing of streets is an improvement subject to the special assessment provisions of Chapter 40-22 of the North Dakota Century Code. Nowhere in said Chapter or any other statutory enactment concerning the paving of streets is there to be found any restriction on the time element contemplated by your question. Therefore, it is the opinion of this office that the city can proceed to reseal streets and make assessments regardless of when the last improvement was made, so long as the requirements of Chapter 40-22 have been met.

I trust that the foregoing answers your inquiry.

Yours very truly,

ALLEN I. OLSON

Attorney General